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No. 98-1845

In the Supreme Court of the United States

STATE UNIVERSITY OF NEW YORK, COLLEGE AT NEW PALTZ, ET AL., PETITIONERS

v.

DR. JANICE W. ANDERSON, PH.D.

AND

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Congress's abrogation of the States' Eleventh Amendment immunity in the Equal Pay Act of 1963, 29 U.S.C. 206(d), falls within Congress's power under Section 5 of the Fourteenth Amendment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 169 F.3d 117. The order and bench opinion of the district court (Pet. App. 11a-13a, 14a-26a) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 24, 1999. The petition for a writ of certiorari was filed on May 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, the Board of Trustees of the State University of New York, the State University of New York College at New Paltz, and various school officials, employ respondent. Pet. App. 3a-4a. She filed suit alleging that petitioners paid her less than similarly situated male employees in violation of the Equal Pay Act of 1963, 29 U.S.C. 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and that petitioners retaliated against her for complaints about the pay disparity. Pet. App. 33a-35a.[1]

Petitioners moved to dismiss the claims on the ground that the Eleventh Amendment barred them. The district court denied the motion to dismiss the federal claims, concluding that both the Equal Pay Act and Title VII contain valid abrogations of the States' Eleventh Amendment immunity. Pet. App. 16a-17a.[2]

2. Petitioners took an interlocutory appeal of the denial of Eleventh Amendment immunity. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). Shortly after learning of petitioners' constitutional challenge, the United States moved to intervene on appeal as of right, pursuant to 28 U.S.C. 2403(a),[3] to defend the constitutionality of Con-

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[1] Respondent also filed two state law claims, which the district court dismissed. Pet. App. 15a-16a.

[2] The district court denied petitioners' motion for summary judgment on the Equal Pay Act claim, but granted it for the Title VII and retaliation claims. Pet. App. 18a-24a.

[3] Section 2403(a) provides:

> In any action, suit, or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in

gress's abrogation of Eleventh Amendment immunity. Petitioners opposed the United States' intervention. The court of appeals' docket sheet reflects that the court accepted the United States' brief for filing. The court of appeals never issued an order regarding the United States' intervention, however. While the opinion of the court identifies the United States as an intervenor, Pet. App. 2a-3a, the docket sheet refers to the United States as an amicus curiae. Because Section 2403(a) affords the United States an unconditional right to intervene, the United States considered itself a party to the proceedings in the court of appeals and continues to assert that status before this Court.[4]

The court of appeals affirmed the district court's denial of petitioners' motion to dismiss on Eleventh Amendment grounds. Pet. App. 1a-10a. Pursuant both to petitioners' concession and circuit precedent, the court ruled that the Equal Pay Act contains a clear statement of Congress's intent to abrogate the States' Eleventh Amendment immunity. *Id.* at 6a. The court also held that the Equal Pay Act is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity. *Id.* at 7a-10a. The court explained that the Equal Pay Act's burden-shifting scheme—in which plaintiffs must show that the employer pays different wages to employees of the opposite sex for equal work, and then

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question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

[4] Should there be any question about the matter, however, the United States requests that the Court accept this brief in opposition as notice of the United States' intervention in this case before this Court.

defendants must show that the differential is based on any factor other than sex—"reaches only those wage disparities for which the employee's sex provides the sole explanation" and thus is "reasonably tailored to remedy intentional gender-based wage discrimination." *Id.* at 9a.

ARGUMENT

The court of appeals' ruling that the Equal Pay Act validly abrogated the States' Eleventh Amendment immunity is correct and consistent with the decisions of this Court and every other court of appeals that has addressed the question. Accordingly, further review is unwarranted.

A. In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court held that the question whether Congress has abrogated Eleventh Amendment immunity in particular legislation contains two elements: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' * * * and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Id.* at 55 (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)). Petitioners concede that Congress clearly expressed its intention to abrogate the States' Eleventh Amendment immunity in the Equal Pay Act. Pet. 5 n.1; Pet. App. 6a.[5]

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[5] Eight other courts of appeals have also held that the definitional and enforcement provisions of the Equal Pay Act contain the necessary "clear statement" of congressional intent to abrogate the States' Eleventh Amendment immunity. See *Mills* v. *Maine*, 118 F.3d 37, 42 (1st Cir. 1997); *Abril* v. *Virginia*, 145 F.3d 182, 186 (4th Cir. 1998); *Ussery* v. *Louisiana*, 150 F.3d 431, 435 (5th Cir. 1998), cert. dismissed, 119 S. Ct. 1161 (1999); *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833, 837-838 (6th Cir. 1997); *Varner* v. *Illinois State Univ.*, 150 F.3d 706, 710 (7th Cir. 1998), petition for cert. pending, No. 98-1117; *Humenansky* v. *Regents of the Univ. of*

Petitioners contend (Pet. 12-14), however, that Congress lacked the legislative authority to effect that abrogation because the Equal Pay Act is not an appropriate exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Seminole Tribe*, 517 U.S. at 59, 65-66 (Section 5 of the Fourteenth Amendment grants Congress the power to abrogate the Eleventh Amendment); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). That claim does not merit this Court's review.

First, as petitioners concede (Pet. 11), every court of appeals that has addressed the question has ruled that the extension of the Equal Pay Act to the States was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Ussery* v. *Louisiana*, 150 F.3d 431, 435 (5th Cir. 1998), cert. dismissed, 119 S. Ct. 1161 (1999); *Varner* v. *Illinois State Univ.*, 150 F.3d 706, 709-717 (7th Cir. 1998), petition for cert. pending, No. 98-1117; *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833, 838-839 (6th Cir. 1997); *Usery* v. *Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery* v. *Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977).[6]

Minn., 152 F.3d 822, 825 (8th Cir. 1998), petition for cert. pending on other grounds, No. 98-1235; *Hale* v. *Arizona*, 993 F.2d 1387, 1391-1392 (9th Cir.) (en banc), cert. denied, 510 U.S. 946 (1993); *Aaron* v. *Kansas*, 115 F.3d 813, 814-815 (10th Cir. 1997).

[6] We are aware of appeals involving the validity of the Equal Pay Act's abrogation pending in two other circuits. See *Larry* v. *Board of Trustees*, 975 F. Supp. 1447 (N.D. Ala. 1997), aff'd on reconsideration, 996 F. Supp. 1366 (1998), appeal pending, No. 98-6532 (11th Cir.) (argued Mar. 23, 1999); *O'Sullivan* v. *Minnesota*, No. 98-2706 (8th Cir.) (argued May 13, 1999).

Petitioners point (Pet. 8) to "disarray" in the circuits regarding the constitutionality of Congress's abrogation of Eleventh Amendment immunity in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* This Court, however, has already granted certiorari to resolve that conflict in cases that (unlike petitioners') actually present that question. See *United States* v. *Florida Board of Regents*, No. 98-796, and *Kimel* v. *Florida Board of Regents*, No. 98-791. The utter lack of disarray or even substantive disagreement in the appellate decisions analyzing the Equal Pay Act thus stands in sharp contrast to the Section 5 issues presented by other legislation and counsels strongly against further review.

Second, contrary to petitioners' argument (Pet. 12-14), the court of appeals correctly concluded that the Equal Pay Act falls squarely within Congress's power under Section 5 of the Fourteenth Amendment. The Equal Pay Act prohibits employers from paying workers of one sex more than workers of the opposite sex for performing equal work. See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). Once an employee has proven equal work and unequal pay, an employer bears the burden of persuasion (if it chooses to mount an affirmative defense) to show that the difference is not based on sex. See *id.* at 196-197. In essence, Congress has established a rebuttable presumption that unequal pay of opposite sex employees for equal work is intentional sex discrimination, but permits employers to rebut that presumption by showing that the actual cause of the disparity is a factor other than sex.

B. Petitioners argue (Pet. 12) that the Equal Pay Act falls beyond Congress's power under Section 5 because it permits the imposition of liability without the show-

ing of intentional discrimination that the Equal Protection Clause requires, see, *e.g.*, *Washington* v. *Davis*, 426 U.S. 229 (1976). In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), however, this Court reaffirmed that, when enacting remedial or preventive legislation under Section 5, Congress is not limited to prohibiting unconstitutional activity. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Id.* at 518. Similarly, in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), *City of Rome* v. *United States*, 446 U.S. 156 (1980), and most recently in *Lopez* v. *Monterey County*, 119 S. Ct. 693 (1999), this Court upheld the constitutionality of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect, even if no discriminatory intent is shown. *South Carolina* v. *Katzenbach*, 383 U.S. at 324-337; *City of Rome*, 446 U.S. at 177; *Lopez*, 119 S. Ct. at 703.[7] Indeed, in *Flores*, the Court expressly reaffirmed that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause." 521 U.S. at 529 (citing *City of Rome*, *supra*, and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) (plurality opinion)). Congress's authority to prevent sex discrimination is equally broad.

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[7] See also *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986); *Mississippi Republican Exec. Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.) (upholding 1982 amendments to the Voting Rights Act that permitted challenges based on the discriminatory effects of voting practices, even though the Court had ruled that discriminatory effects alone do not violate the Fourteenth Amendment).

Moreover, unlike the statute at issue in *Flores*, which imposed a strict scrutiny standard on all state action even though there was little evidence of widespread constitutional violations, 521 U.S. at 530-533, the Equal Pay Act addresses the discrete problem of gender discrimination in salaries by establishing a remedial scheme that is carefully tailored to detecting and preventing those acts (unequal pay for equal work) most likely to be the result of such unlawful discrimination. Also unlike *Flores*, in which the Court found the "legislative record lack[ed] examples of modern instances" of intentional discrimination, *id.* at 530, Congress enacted the Equal Pay Act based on a record that employers were intentionally and systematically paying women less than men for equal work.[8] Like their private counterparts, States have engaged in a long history of discrimination on the basis of sex. See *United States* v. *Virginia*, 518 U.S. 515, 531-534 (1996).[9] Indeed, in extending Title VII to the States just two years before it extended the Equal Pay Act, Congress found evidence of sex discrimination by public employers.[10] This

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[8] See S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963); H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962); S. Rep. No. 2263, 81st Cong., 2d Sess. 2, 4 (1950); S. Rep. No. 1576, 79th Cong., 2d Sess. 2-3 (1946); *Corning Glass Works*, 417 U.S. at 195; see also *Kahn* v. *Shevin*, 416 U.S. 351, 353 (1974) (finding that "firmly entrenched practices" made "the job market * * * inhospitable to the woman seeking any but the lowest paid jobs").

[9] Cf. *Jefferson County Pharmaceutical Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 158 (1983) ("economic choices made by public corporations * * * are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders").

[10] See S. Rep. No. 415, 92d Cong., 1st Sess. 7-8, 12 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 4-5, 20 (1971); see also *North*

"information and expertise that Congress acquires in the consideration and enactment of earlier legislation," *Fullilove*, 448 U.S. at 502-503 (opinion of Powell, J.), provides more than sufficient support for the tailored remedial scheme that Congress imposed.

C. Petitioners argue (Pet. 13) that Title VII is sufficient to prevent and remedy constitutional violations and thus that the Equal Pay Act is not "needed." The short answer is that Congress found otherwise, and it is for "*Congress* in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.'" *Flores*, 521 U.S. at 536 (emphasis added) (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)). Congress's judgments in that regard, moreover, "are entitled to much deference." *Flores*, 521 U.S. at 536; see also *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983) (legislation enacted pursuant to Congress's Section 5 authority is valid if the court can "discern some legislative purpose or factual predicate that supports the exercise of that power"); *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880).[11]

Haven Bd. of Educ. v. *Bell*, 456 U.S. 512, 523 n.13 (1982) (noting that "[m]uch of the testimony" at the hearings for Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibits sex discrimination by educational programs receiving federal funds, "focused on discrimination against women in employment").

[11] See also *City of Rome*, 446 U.S. at 175; *Strauder* v. *West Virginia*, 100 U.S. 303, 311 (1880); *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949) (opinion of Jackson, J.) ("In no matter should we pay more deference to the opinions of Congress than in its choice of instrumentalities to perform a function that is within its power."); cf. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

Congress found it appropriate, as it has with other civil rights legislation, to enact overlapping remedial schemes to ensure that the vestiges of previous employment discrimination are eradicated root and branch. See *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 524-526 & nn. 14, 16 (1982) (Title VII and Title IX both provide remedies for sex discrimination in employment); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 457-461 (1975) (Title VII and 42 U.S.C. 1981 both provide remedies for race discrimination in employment); cf. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 413-417 (1968) (42 U.S.C. 1982 and Fair Housing Act, 42 U.S.C. 3601 *et seq.*). Here, Congress found it important to supplement Title VII's general prohibition on discrimination in employment with a statutory scheme that is specially constructed to root out a particular manifestation of discrimination in the employment context.

In any event, petitioners utterly fail to explain how a perceived duplication in legitimate exercises of Congress's power implicates federalism interests. The proper inquiry is whether Congress has the power to legislate under Section 5; if it does, it may do so through one law or many laws with overlapping components without altering the federalism calculus. The Eleventh Amendment has never been considered a license for courts to superintend such quintessentially legislative judgments.

In short, given Congress's superior fact-finding ability and the attendant "wide latitude" (*Flores*, 521 U.S. at 520) to which Congress is entitled in exercising its "comprehensive remedial power" under Section 5 of

the Fourteenth Amendment,[12] the Equal Pay Act's scheme to detect and deter sex discrimination in wages is an appropriate exercise of Congress's Section 5 authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) (quoting *Fullilove*, 448 U.S. at 483).